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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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SANDY FARMER,

Plaintiff and Appellant,

v.

LODI MEMORIAL HOSPITAL ASSOCIATION,  
INC.,

Defendant and Respondent.

C068489

(Super. Ct. No.  
39201000236649CUWTSTK)

This appeal arises after the trial court granted defendant Lodi Memorial Hospital Association's motion for summary judgment in plaintiff Sandy Farmer's action for damages due to alleged wrongful termination. We find no triable issues of fact. Farmer's statutory claims are barred because they were filed too late, and her contract claims are barred because she was an at-will employee. Finally, she has not shown error in the trial court's ruling denying her motion to amend. Accordingly, we shall affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *The Pleadings*

On March 5, 2010, Farmer filed her complaint. She alleged that while working for the Lodi Memorial Hospital (Hospital) she developed "a digestive disorder and in addition began suffering from depression[.]" In July 2008, she sought "a reasonable accommodation to take time off work to be able to attend to her medical needs," but at some unspecified time was fired "for taking off excessive time." The complaint alleged four legal theories, captioned as separate causes of action: (1) failure to accommodate under the Fair Employment and Housing Act (Gov. Code, § 12900, et seq.<sup>1</sup>; "FEHA"); (2) failure to provide medical leave under a portion of FEHA officially called the Moore-Brown-Roberti Family Rights Act, but more popularly referred to as the California Family Rights Act (§ 12945.1 et seq.; "CFRA"); (3) breach of an oral agreement that she would not be fired without notice of deficiencies; and (4) breach of an implied good-cause employment provision.

To show that she had exhausted applicable administrative remedies, Farmer attached to her complaint a right-to-sue letter from the Department of Fair Employment and Housing (DFEH) dated August 31, 2009. Contrary to assertions in Farmer's briefing that this letter shows DFEH made factual findings about the timing of her claims, the letter simply states that no action

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<sup>1</sup> Further undesignated statutory references are to the Government Code.

was taken by DFEH "because an immediate right-to-sue notice was requested."

The Hospital's answer generally denied the allegations and raised boilerplate affirmative defenses.

*The Summary Judgment Motion*

On August 9, 2010, the Hospital moved for summary judgment, alleging Farmer's FEHA claims were barred due to her failure to timely exhaust administrative remedies, and her contract claims were barred because she was an at-will employee.

As for the FEHA claims, the undisputed material facts showed Farmer was fired on August 5, 2008, and signed her DFEH claim on August 20, 2009--received by DFEH on August 28, 2009--more than a year later. The Hospital argued that Farmer's DFEH claim was filed too late. An attached termination form and letter dated August 5, 2008, showing Farmer's absences, were authenticated by Mark Wallace, the Hospital's Director of Human Resources.

As for the contract claims, the undisputed facts showed Farmer signed an at-will employment agreement. Farmer conceded in deposition that she understood the at-will policy, and was never told she would be "treated specially" regarding the duration of her employment.

On April 21, 2004, Farmer signed a receipt for an employee handbook stating in part, "I understand and agree that nothing in the employee handbook creates nor is intended to create a promise or representation of continued employment and that employment at the hospital is employment at will; employment may

be terminated at the will of either the hospital or me.” Farmer also signed an at-will document on December 8, 2004, stating: “It should be remembered that employment is at the mutual consent of the employee and the hospital. Accordingly, either the employee or the hospital can terminate the employment relationship at will, at any time, with or without cause or advanced notice.”

The Hospital also tendered evidence showing Farmer’s breach of a written absence policy.

*Opposition to Summary Judgment and Motion to Amend*

On October 19, 2010, Farmer filed her opposition.

Farmer disputed the date of termination by declaring that, although she was told she was fired on August 5, 2008, she was not given the termination letter, she received *disability payments* from the Employment Development Department (EDD) until October 11, 2008, and she thought her employment continued until then “even though I had been given notification of termination on August 5, 2008.”

Farmer objected that the handbook itself had not been placed into evidence by the Hospital.

Farmer sought judicial notice of disability payments she received from EDD.

Farmer also moved to amend to allege theories of “breach of employment contract in violation of public policy and violation of the Federal Medical Leave Act[.]” Counsel’s supporting declaration unintelligibly stated: “The amendment is based upon

the same set of fact[s] as set forth in the original complaint and merely sets forth two new legal theories for recovery. The request for the amendment was not made earlier because application to the facts at hand prior to preparing a response to the summary judgment motion." [Sic.]

Although the summary judgment motion hearing was set for November 2, 2010, Farmer's counsel calendared a December 10, 2010, hearing date for the motion to amend.

*Reply to Opposition*

In its reply to Farmer's opposition, the Hospital noted that Farmer had not filed separate objections to any of its evidence, but buried her objections within her response to the separate statement of facts, and generally argued Farmer had failed to raise any triable issues. In particular, the Hospital pointed to Farmer's deposition testimony, in which she conceded that on August 5, 2008, she was told "they were going to have to terminate" her due to excessive absences, she was handed an envelope with her final paycheck "and information about unemployment," and "after I was handed that envelope, at that time, I felt I was terminated. I was no longer an employee" and that when Wallace suggested that they talk "about it," she refused because she was upset and did not want to display her emotions.

*Court Hearings and Rulings*

At the November 2, 2010 hearing on the summary judgment motion, Farmer sought a continuance until her motion to amend could be heard, but conceded no new facts were pleaded. Farmer

also contended an addendum to Wallace's declaration, adding a missing page from the Hospital's absence policy, was significant new information.

The trial court took the matter under submission, and issued a ruling on November 18, 2010, granting summary adjudication of all causes of action but keeping "the case open to consider the Motion to Amend[,] " a procedure that had been suggested by the Hospital's counsel.

On December 3, 2010, Farmer's counsel filed a declaration stating he had not known the Hospital disputed that Farmer had requested medical leave or contended that she was fired on August 5, 2008, until the summary judgment motion.

After the December 10, 2010 hearing, the trial court denied the motion to amend because: (1) it was untimely; *and* (2) "Plaintiff has failed to comply with the requirements of California Rules of Court[;]" *and* (3) "the wrongful termination cause of action Plaintiff seeks to add to the underlying complaint is barred by the statute of limitations as it does not 'relate back' to the original complaint."

The trial court then entered a judgment for the Hospital, from which Farmer timely appealed.

### **DISCUSSION**

As we explain, we find no basis to reverse the judgment.

#### **I**

#### *Summary Judgment Rules*

We first set forth some basic rules about summary judgments.

The function of the pleadings in a motion for summary judgment is to define and delineate materiality. (See *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381 ["The parties . . . are oblivious to the role of the pleadings as the outer measure of materiality in a summary judgment proceeding. They have employed the pleadings as a ticket to the courtroom which may be discarded after admission"].) Relevant facts *should be* set forth in the separate statement of material facts, but the trial court may consider other facts. (*Hawkins v. Wilton* (2006) 144 Cal.App.4th 936, 945-946 (*Hawkins*); *Fenn v. Sherriff* (2003) 109 Cal.App.4th 1466, 1480-1481 ["we undoubtedly have the same discretion as the trial court to consider evidence not [in the] separate statement"].)

"A party objecting to evidence presented on a summary judgment motion must either object orally at the hearing or timely file separate, written evidentiary objections." (*Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 192-193; see *Public Utilities Com. v. Superior Court* (2010) 181 Cal.App.4th 364, 376, fn. 9; Cal. Rules of Court, rules 3.1352, 3.1354(b) ["All written objections to evidence must be served and filed separately from the other papers in support of or in opposition to the motion"].) It is not enough to bury an objection to evidence within the response to the separate statement of undisputed facts.

"We review summary judgment appeals by applying the same three-step analysis applied by the trial court: First, we identify the issues raised by the pleadings. Second, we

determine whether the movant established entitlement to summary judgment, that is, whether the movant showed the opponent could not prevail on any theory raised by the pleadings. Third, *if the movant has met its burden*, we consider whether the opposition raised triable issues of fact." (*Hawkins, supra*, 144 Cal.App.4th at pp. 939-940; see *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).)

## II

### *FEHA Claims*

Under the FEHA, a claimant must file an administrative claim within one year of the adverse employment action before filing suit. (§ 12960, subd. (d) ["No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred," with exceptions not relevant herein]; see *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 495 (*Romano*) ["the date that triggers the running of the limitations period under the FEHA is the date of actual termination"]; see also *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 822-824 (*Richards*).)

Farmer's right-to-sue letter gave her the right to sue for conduct occurring *within the year before* the filing of her DFEH claim. (§ 12960; see *Romano, supra*, 14 Cal.4th at pp. 491-493; *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1040 ["conduct occurring (more than one year before the claim) cannot serve as the basis for liability unless some exception to the one-year limitations period applies"].)

Farmer conceded in deposition that she knew she had been fired on August 5, 2008. Although on appeal Farmer discounts the conclusiveness of that deposition response, she provided no evidence in the trial court to rebut it. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 500, fn. 12; *Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 860-861; see also *Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1522.)

Farmer contends that the fact she received disability benefits after August 5, 2008, shows there is a factual dispute about when she was terminated. However, Farmer fails to explain how any decision by EDD to send her disability checks could extend her already-terminated at-will employment relationship. Indeed, a claimant *cannot* receive disability checks while still working, as the purpose of the law is to pay benefits “to disabled persons, i.e., those who, because of their physical or mental condition, *are unable to perform their regular or customary work.*” (3 Witkin, Sum. of Cal. Law (10th ed. 2005) Agency, § 463, p. 560, emphasis added; see Unemp. Ins. Code, §§ 2626, subd. (a), 2627 [disabled person eligible to receive “benefits equal to one-seventh of his or her weekly benefit amount for each full day during which he or she is unemployed due to a disability”].) Farmer’s receipt of disability benefits does not change her termination date.<sup>2</sup>

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<sup>2</sup> Farmer cites Unemployment Insurance Code section 2707, which provides EDD “shall give a notice of the filing of a first claim for each disability benefit period to the employing unit by which the claimant was last employed immediately preceding the

Contrary to Farmer's view, nothing in *Richards, supra*, 26 Cal.4th 798, aids her cause. That case involved the "continuing violation" doctrine--a doctrine not discussed in Farmer's briefing--and concluded that where an employee alleges a continuing pattern of failing to accommodate a disability, ultimately causing the employee to resign, "an employer's series of unlawful actions . . . should be viewed as a single, actionable course of conduct if (1) the actions are sufficiently similar in kind; (2) they occur with sufficient frequency; and (3) they have not acquired a degree of 'permanence' so that employees are on notice that further efforts at informal conciliation with the employer to obtain accommodation or end harassment would be futile." (*Richards, supra*, at pp. 801-802.) Here, Farmer knew she was terminated on August 5, 2008. The Hospital's actions had reached "'permanence'" such that Farmer was on notice that further informal efforts were futile.

Farmer contends "equitable tolling" should apply, because she did not know she had been terminated until her EDD checks stopped in October 2008. This claim, too, fails in light of her concession that she knew she had been fired on August 5, 2008.

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filing of such claim." Another statute requires "the last employer" to give information "which may bear upon the claimant's eligibility" for benefits. (Unemp. Ins. Code, § 2707.1.) Contrary to Farmer's view, these statutes do not mean the Hospital had to prove it notified EDD that it had terminated Farmer in order to prevail on summary judgment. Indeed, the statutes refer to a claimant's "last" employer, which encompasses an already-severed employment relationship. And Farmer provided no evidence that EDD made a factual finding about the date of her termination, as she implies.

Moreover, equitable tolling applies "[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one." [Citations.] Thus, it may apply where one action stands to lessen the harm that is the subject of a potential second action; where administrative remedies must be exhausted before a second action can proceed; or where a first action, embarked upon in good faith, is found to be defective for some reason." (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 100 (*McDonald*).)

So far as this record shows, Farmer did *nothing* to press her claims until she submitted her DFEH claim on or about August 20, 2009. As the Hospital points out: "A claim for state disability is not a claim challenging [the Hospital's] actions or defenses." Thus, nothing Farmer did promoted conciliation or alternative resolution of her dispute with the Hospital. (Cf. *McDonald, supra*, 45 Cal.4th at pp. 107-111; *Downs v. Department of Water & Power* (1997) 58 Cal.App.4th 1093, 1099-1102 [FEHA claims equitably tolled while plaintiff sought relief from analogous federal administrative forum].)

Accordingly, the trial court correctly found that Farmer's FEHA theories were barred because her FEHA claim was untimely.

### III

#### *Contract Claims*

Farmer contends she raised triable issues of fact about her oral and implied contract claims. This contention borders on frivolous.

By statute, employment is presumed to be terminable

at-will. (Lab. Code, § 2922; see *Guz, supra*, 24 Cal.4th at p. 350 [“the employer may act peremptorily, arbitrarily, or inconsistently, without providing specific protections such as prior warning [or] fair procedures”].) The parties to an employment relationship are free to enter into an express or implied contract that alters the statutory presumption. (*Guz, supra*, at pp. 335-337.) But in this case, the Hospital presented undisputed evidence that the parties *confirmed* the at-will nature of their relationship.

Contrary to Farmer’s view, the Hospital did not rely on inconclusive “disclaimer language in an employee handbook or policy manual[.]” (*Guz, supra*, 24 Cal.4th at p. 340.) In addition to signing a receipt on April 21, 2004 for the handbook acknowledging that Farmer was an at-will employee, Farmer signed a document on December 8, 2004, confirming that status. These documents “established beyond contrary inference that the employer intended employment to be at will.” (*Guz, supra*, at pp. 340-341, fn. 11; see *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 388, 392 [employee signed a letter accepting at-will terms]; *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1215 [arbitration provision in handbook enforced where employee signed acknowledgement of receipt].)

An express written agreement providing for at-will employment cannot be avoided by proof of an implied contrary understanding. (*Guz, supra*, 24 Cal.4th at p. 340, fn. 10; *Starzynski v. Capital Public Radio, Inc.* (2001) 88 Cal.App.4th 33, 38; see *Tomlinson v. Qualcomm, Inc.* (2002) 97 Cal.App.4th

934, 946-947 [employee cannot rely on representations by employer or agents that contradict express at-will agreement].)

Farmer complains that the handbook itself was never tendered as evidence. We fail to see the relevance of this point. The evidence tendered by the Hospital abundantly confirmed the at-will nature of Farmer's employment. If Farmer thought anything in the handbook contradicted that fact, she could have tendered it in opposition.

The trial court properly found that Farmer's contract claims were barred by the at-will nature of her employment.

#### IV

##### *Denial of Leave to Amend*

Farmer contends the trial court abused its discretion in denying her leave to amend the complaint.

Farmer's opening brief does not address the trial court's finding that the motion to amend failed to comply with the California Rules of Court, an issue the Hospital had raised in the trial court. We presume that ground for denying leave to amend was correct. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Accordingly, that ground sufficiently supports the trial court's order. (See *In re Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 513; *Filipino Accountants' Assn. v. State Bd. of Accountancy* (1984) 155 Cal.App.3d 1023, 1029.)<sup>3</sup>

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<sup>3</sup> In the *reply brief*, Farmer purports to address the formal defects in her motion to amend, but these arguments come too

In any event, Farmer has not shown the trial court abused its discretion by finding that her motion to amend was untimely.

"While under section 473 of the Code of Civil Procedure and the case authorities pertaining thereto the trial court has wide discretion in allowing the amendment of any pleading [citations], as a matter of policy the ruling of the trial court in such matters will be upheld unless a manifest or gross abuse of discretion is shown [citations]." (*Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 135-136; see *Vogel v. Thrifty Drug Co.* (1954) 43 Cal.2d 184, 188-189.)

More particularly, it has been said that "amendments are usually allowed after summary judgments have been filed only to repair complaints that are legally insufficient--in other words, those that would be subject to a motion for judgment on the pleadings." (*Van v. Target Corp.* (2007) 155 Cal.App.4th 1375, 1387, fn. 2.) Responding to a summary judgment motion by amending the complaint to add new legal theories is not generally appropriate. (*Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th 614, 625-627 [amendment in response to summary

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late. (See *Utz v. Aureguy* (1952) 109 Cal.App.2d 803, 808.) We fail to understand the delay, as Farmer's counsel had pressed the trial court on this very point, stating "we are . . . reviewing this matter for possible appeal, so it's important for us to know what reason, whether it was one or all three of them as to why the Court denied the motion to amend."

We need not address the trial court's *third* ground, namely, that the new wrongful termination claim did not "relate back" to the original claims. (But see *Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 265-266.)

judgment motion rejected where plaintiff “was attempting to establish a different theory of recovery” and “failed to submit evidence that would have raised any triable issue of fact”], disapproved on another ground by *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031, fn. 6.)

A summary judgment motion is directed at the issues joined by the pleadings. (See *FPI Development, Inc. v. Nakashima*, *supra*, 231 Cal.App.3d at p. 381.) “To allow an issue that has not been pled to be raised in opposition to a motion for summary judgment in the absence of an amended pleading, allows nothing more than a moving target.” (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258, fn. 7; see *Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 175-176 [belated motion to amend properly denied].)

Here, even crediting Farmer’s counsel’s declaration, he thought of new legal theories--*not new facts*--after receiving the Hospital’s summary judgment motion. His alleged belated epiphany did not compel the trial court to find good cause to allow an amendment. (See *Huff v. Wilkins* (2006) 138 Cal.App.4th 732, 746 [“Huff conceded he had no new facts on which to base a claim for reckless conduct, and he failed to offer any explanation for his delay in seeking leave to amend”]; *Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 770-771 [“Levy did not explain why he waited several months after [purportedly critical] discovery to seek leave to amend his complaint; did not file a procedurally proper motion for leave to amend<sup>[fn.]</sup>; and did not request a continuance” of summary judgment hearing];

*Record v. Reason* (1999) 73 Cal.App.4th 472, 486-487 [proposed amendment alleged no new facts].)

Farmer has not shown any abuse of the trial court's broad discretion to consider Farmer's motion to amend her complaint.

**DISPOSITION**

The judgment is affirmed. Farmer shall pay the Hospital's costs of this appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

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DUARTE, J.

We concur:

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HULL, Acting P. J.

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BUTZ, J.